No. 4446

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, Upon the Relation of J. L. FINCH,

Appellant,

vs.

H. S. ELLIOTT, a United States Commissioner for the Western District of Washington,

Appellee.

BRIEF OF APPELLANT.

Upon Appeal From the United States District Court for the Western District of Washington, Northern Division.

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STATEMENT OF THE CASE.

Appeal from a final order of the lower court denying relator's petition for a writ of certiorari.

Relator filed with the lower court his petition for a writ of certiorari in which the following facts were alleged:

Relator is a lawyer, practicing his profession at 1026 L. C. Smith Building, in the City of Seattle. Certain named prohibition agents appearing before respondent, H. S. Elliott, a United States Commissioner for the Western District of Washington, with-out a sufficient showing of "probable cause," obtained from the latter a search warrant alleged to be void in law, under which they proposed to search relator's office for intoxicating liquors. Armed with this search warrant, they made search of such office. They found no intoxicating liquor. But they carried away with them a vast amount of papers, a list of which was appended to the petition. It was further alleged that this search was "wholly without any lawful or just purpose and intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage, and a clear abuse of the process under which such action was taken";

that the papers taken "were valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belonged to him personally, some of which belonged to his clients, and had been entrusted to his care as an attorney, and others of which were memoranda and papers having to do with his professional matters, and all of which were of a more or less confidential nature, and of great value to him personally and to the practice of his profession, and many of which were necessary to him in the preparation and conduct of the cases then pending in court, or about to be commenced therein"; that the search was made "for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of relator to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced." It was further alleged, that if the papers were not impounded under process of the court, those who held the same under such search warrant would make unlawful use thereof, and of the contents thereof, to the great and irreparable harm of relator. It was further alleged "that returns of such search warrants are not made as

required by law, but that the officer making such search unlawfully withhold their return of such warrants for unreasonable and wholly unjustified periods of time, and that relator had reason to believe that in the instant matter no return would be made to such warrant within the time prescribed by law, or within any time within reason, and that no hearing before the commissioner controverting the basis for the issuance of said warrant could or would be had within such period of time as to prevent irreparable injury to relator''; that relator was without any plain, speedy or adequate remedy in the ordinary course of law, and that there was no appeal to be had from any proceedings before such commissioner. Relator prayed, inter alia, that a writ issue to the end and purpose that a review of all proceedings before the commissioner be made, and a time be fixed in the writ for the return of all such proceedings, and for a hearing thereon, and that on such hearing such relief be granted as to the court might seem meet and proper in the premises. Relator also prayed, that a writ issue ordering and directing that, pending such hearing, the papers be impounded with the Marshal or Clerk of the Court; further, that an order issue restraining all officers,

agents, and persons whomsoever, into whose hands said papers had come, from making any use thereof, or of any knowledge or information gained therefrom. (Transcript, pages 2, 3, 4, 5 and 6).

Upon presentation of this petition the court invited the United States Attorney to appear therein, that the court might have the benefit of argument.

After hearing had, the court filed his decision denying relator any relief. (Transcript, p. 16, *et seq.*).

Subsequently, a formal order was entered in accordance with the decision of the court. (Transcript, p. 27).

From this order denying relief, relator has appealed to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in denying the petition filed in this cause.

2. The court erred in not granting a writ of certiorari in this cause.

3. The court erred in not granting a writ of certiorari, with ancillary orders of supersedeas, in this cause.

4. The court erred in not granting the relief prayed for in this cause.

5. The court erred in not granting any relief in conformity with the petition in this cause.

ARGUMENT.

This is a case without exact parallel in the books. Circumstances crying out for immediate relief made it necessary that relator employ, or attempt to employ, remedies seldom, if ever, employed in the manner attempted. Nevertheless, relator feels the proceeding was justified upon principle, and that the lower court erred in refusing him its aid.

A better understanding of our theory may be had if first the situation be presented nakedly. Relator is a lawyer practicing his profession after the manner of all lawyers. His offices are located in Room 1026, L. C. Smith Building, in the City of Seattle. He had in his office "valuable memoranda, papers, files, letters, receipts, bills and other papers of importance, some of which belonged to him personally, some of which belonged to his clients and had been entrusted to his care as an attorney, and others of which were memoranda and papers having

to do with his professional matters, and all of which were of more or less confidential nature and of great value to him personally and in the practice of his profession, and many of which were necessary for him in the preparation and conduct of cases pending in court, or about to be commenced therein." (Transcript p. 3.) Prohibition agents, brazenly and boldly representing to a United States Commissioner that relator and others were unlawfully dealing in intoxicating liquor at relator's office, obtained a search warrant to search the premises. They found no liquor. But they rummaged the office, and carried away with them an armful of papers of various kinds, to be used not only as evidence in themselves, but from which leads to other evidence would be obtained. The proceeding was unlawful. No right exists to search for evidence alone. (*Gouled vs. U. S.*, 255 U. S. 298, 65 L. Ed. 647.) But the papers were gone, and, unless they could be retrieved *instanter,* irreparable injury would be done relator and his clients. What to do? Any remedy to be conceived of was no remedy at all, unless it carried with it at least the immediate impoundment of the papers, so that not only copies or memoranda thereof could not be made of them, but that prying eyes

should not even examine them. They could not be replevied. (Sec. 25, Title 2, N. P. A.). Nor would a summary proceeding lie; for no cause was pending in any court giving the court jurisdiction of the subject matter; and the parties in possession of the papers were not officers of the court, so as to be reached in summary manner. (*Weinstine vs. Attorney General,* 271 Fed. 673; *Lewis vs. McCarthy,* 274 Fed. 496; *In re. Allen,* 1 F. (2nd) 1020; *U. S. vs. Hie,* 219 Fed. 1019.) What, then, was open to relator?

Relator launched a proceeding in the nature of certiorari, to bring up for review the proceedings of the United States Commissioner who issued the search warrant. As ancillary to the certiorari proceedings, relator asked for supersedeas writs, to impound, during such time as the court had under consideration the review of the Commissioner's proceedings, the papers seized under the search warrant, and asked that the court by its process prevent, while so having before it for review the proceedings before the Commissioner, the use of the papers and the use of any information gained by a perusal of them. The theory upon which relator proceeded was, that the search warrant pro-

ceeding was a nullity, because the Commissioner exercised judicial, or at least quasi-judicial, powers, in a matter in which his powers were limited, and had exceeded his jurisdiction in this: (a) he had issued a search warrant, without a showing of probable cause having first been made to arouse his jurisdiction, and (b) he had issued a search warrant void in law, which he was without jurisdiction to do; and the Commissioner having, through void proceedings, caused a certain status to exist, relator believed that the reviewing court had power to issue such ancillary writs of supersedeas, or in the nature thereof, as would keep the status of the proceedings before the judicial officer below exactly where it was when the reviewing court took jurisdiction, so that whatever decree the reviewing court might finally make in the matter would be effective.

We will discuss these propositions in the order in which they seem to arise logically.

DID THE COMMISSIONER EXCEED HIS JURISDICTION?

Who and what is a United States Commissioner we shall discuss later, when we come to discuss the question of reviewing him. For the present, he is

a creature of the statutes, invested with various powers. What the statutes say he may do, he may do without question. But being a creature of limited powers, it goes without saying that he may do *no more* than the statute says he may. No citation of authority is necessary for a proposition so fundamental.

Among other things, he may issue search warrants; but only upon certain conditions precedent. For instance, when affidavits or depositions are presented to him of a certain character, conforming to the requirements of sections 10496¼c, 10496¼d, and 10496¼e of Comp. Stat. Supp. 1919, being sections 3, 4 and 5, of Title XI, of the Act of June 15, 1917, (Espionage Act, search and seizure chapter). But suppose no affidavits, or other showing, is made at all? Clearly, under such circumstances, he has no power to act; and if he does issue a search warrant under such circumstances he acts without jurisdiction; because it requires a showing of some character before his jurisdiction is invoked. Let us suppose, again, that affidavits *are* filed, and depositions *are* taken, but that these affidavits and depositions fall short of the requirements imposed by the sections of the statute just cited. It is none the less

true that the Commissioner exceeds his jurisdiction if he issue a search warrant under such circumstances, because it is only upon the filing of affidavits or the making of depositions which conform to the requirements of the statute, that incite his jurisdiction at all. The books are full of instances where "motions to suppress evidence" have been presented, based upon an alleged insufficiency of the showing of "probable cause." In many instances these challenges have been upheld, and the motions granted. What is the principle underlying the granting of such motions? Nothing else than that the Commissioner was without jurisdiction to issue the search warrant in the given instance.

The Affidavit.

Now, let us look at the showing made in the case at bar. The "application" for the search warrant was made by one Earl Corwin, who describes himself as a "Federal Prohibition Agent," and is found at pages 8 and 9 of the record. Beyond saying that Jerry Finch (and six others, naming them) on the 17th day of November, 1924, was, and is, possessing and selling intoxicating liquor at 1026 L. C. Smith Building in Seattle, and that these

premises were not a dwelling, no statement of any character is contained in this application, though affiant "submits the attached affidavit and incorporates the same herein." This "application" is disposed of by the decision of this court in *U. S. vs. Lochnane,* decided Nov. 10, 1924, Case No. 4314, which at the time of writing we do not find reported in Federal advance sheets.

The "supporting affidavit" referred to in the application is found at page 10 of the record. It, too, is signed by same Earl Corwin—he "supports" himself. We will take it up piecemeal.

> "That on the 12th day of July, 1924, in the City of Seattle, affiant heard Jerry Finch state that he had intoxicating liquor in said premises at 1026 L. C. Smith Building."

Will an allegation that one heard a lawyer say, in July, that he had liquor in his office, be deemed "reasonable cause" to believe he had it there in November following? Indeed, that he ever had it?

> "and has heard said Finch make the statement on one or more times each month in August and September, 1924."

This statement, if made, could no more than excite a suspicion, and a search warrant can not issue on suspicion.

> "and has heard said Finch order intoxicating liquor very recently to be sent to said premises."

There is no showing that it was delivered, or that affiant had any reason to believe that it had been.

> "and has heard said Finch and Olmstead, Fletcher arrange at said premises for the traffic of intoxicating liquor and said parties state that the books and documents relating to the said intoxicating liquor were in said premises, and that some of said conversations were held within less than thirty days last past, and that affiant has heard some of the above parties make arrangements with reputed bootleggers to meet and transact business in said above premises relating to the sale, transportation and possession of intoxicating liquor."

Never having had a chance to deny these allegations, they must be taken here as true, galling as they are to the relator. But it is respectfully urged that, if true, they do not support an application for a search warrant *for liquor*. If offered in evidence at some trial, they might be competent to prove a conspiracy, but they are not statements of facts tending to show *possession of liquor* on the premises at which the search warrant was aimed, and are totally irrelevant to search warrant proceedings.

Taken as a whole, the application and affidavit

are eloquent in that what they do not say. Having had an opportunity to "hear" so much, it is amazing that the affiant, either in his application, or in the affidavit whereby he "supports" himself, could not, or did not, present some evidence from his sense of sight. The care with which the affiant calls attention to "all furniture, safes, receptacles, cabinets, desks, and equipment" of the office, in his application, and the command in the search warrant set forth at page 12 of the record, that he "diligently investigate and search the same (relator's office) and into and concerning said crime, and search the person of said above named persons, and from him or her, or from said premises seize any and all of the property, documents, papers and materials so used in or about the commission of said crime", lends much force to the charge in relator's petition (bottom p. 3, and page 4), "that the entire proceedings * * * were brought and are being prosecuted * * * for no other purpose or intent than to bring about an unlawful and wholly unwarranted search of the office of your relator, to obtain papers, memoranda, letters, files and things which might be used by those making such search in the preparation of cases now pending or about to be commenced, and

was wholly without any lawful or just purpose or intent, was false, oppressive, concocted in deceit, a subterfuge to gain unlawful advantage and a clear abuse of the process under which said action was taken."

We believe the affidavit to have been faulty to the extent that no showing of probable cause was made; hence the jurisdiction of the Commissioner was not invoked.

THE SEARCH WARRANT.

Next let us consider the search warrant. (Record, p. 11). We have three objections to it. (1) It was directed generally, not to a person by name, but to three different classes of persons; (2) It was directed to, *inter alia,* Federal Prohibition Agents; and (3) It directed an investigation and search for evidence.

(1) *The warrant was directed generally, not to a person by name, but to three different classes of persons.* It read:

> "To the Marshal of the United States for the Western District of Washington and his deputies, or either of them, and to *any* Federal Prohibition Officer or Agent, or the Federal

> Prohibition Director of the State of Washington, or any Federal Prohibition Agent of said State, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents, or inspectors."

Note, please, it ran not alone to the Marshal of the District, and his deputies; but to *any* Federal Prohibition Officer or Agent. That means to any person of such character in the entire United States, for the local agents were covered in the direction "to the Federal Prohibition Director of the State of Washington, or (and) any Federal Prohibition Agent of said State." Also, the direction to the Commissioner of Internal Revenue, included his entire corps of assistants throughout the United States.

This is wrong, though we are unable at this moment of writing to lay hands upon any authority in the books. Our conviction, however, is borne of the evils experienced in the present instance. Relator does not know, up to this time, to whom the warrant was actually delivered, nor does he know who has possession of his papers, actually or constructively. The warrant itself has never been returned, nor the property seized turned in to the Commissioner, or into any court. Inquiry made of the perpetrators at the time the outrage was com-

mitted elicited the information that they went under the names of "Earl Corwin," "J. W. Simmons," "Walter Justi" and "W. J. Griffith," but whether they were officers and of what class, or what not, there is no record in this district to show. They may even have been outsiders called in to assist, under authority of the statute. (Comp. St. 1919, Supp. 10496¼g), and in no wise responsible for the acts done. Had the warrant run "to John Jones, United States Marshal, and his deputies," or to some other named officer, relator would know that John Jones, or other named officer, was primarily responsible for any act done under color of the warrant, and if any redress was sought he would know against whom to seek his remedy. Turning to a decision of Judge Neterer, rendered Jan. 8, 1925, not yet reported, this court may learn that relator acting in behalf of one of his clients, one Roy Olmstead, sought to have so much of the papers taken from relator's office as concerned Olmstead kept from the grand jury room. The action was aimed at the United States Attorney, to whom it was alleged, *upon information and belief,* the papers had been delivered for the purpose of placing them before such grand jury. The Honorable United States

Attorney stated in open court, upon the hearing, that he did not have the papers, and, quite naturally, Olmstead was denied the relief sought. This record does not show that the papers got before the grand jury, but this court can readily see our point. They may travel around in circles, from one hand to another, into the grand jury room and out, always under cover; and all due to the fact that the search warrant fixed no single definite responsibility upon any one. The Commissioner made possible the execution of the warrant, but impossible the responsibility therefor. A warrant of that character must of necessity be void.

Strength is given this view from a reading of Section 7, Title XI, of the Act of June 15, 1917 (10496¼g) :

> "A search warrant may in all cases be served by any of the officers mentioned in its direction, *but by no other person*, except in aid of the officer on his requiring it, *he being present* and acting in its execution."

Note, in connection with the naming of the officer to serve the warrant:

U. S. vs. Syrek, 290 Fed. 820;
U. S. vs. Innelli, 286 Fed. 731;

U. S. vs. Musgrave, 293 Fed. 203;
Contra, Gandreau vs. U. S., 300 Fed. 21.

(2) The *search warrant was directed to Federal Prohibition Agents, inter alia.* Besides being directed to the United States Marshal and his deputies, and to the United States Commissioner of Internal Revenue, and his entire corps of assistants, deputies, agents and inspectors, it also ran,

> "to any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washington, or any Federal Prohibition Agent of said State."

We contend the law does not permit a United States Commissioner to issue a search warrant directed to prohibition agents. If correct in this view, the Commissioner exceeded his authority in so doing, and his act was void for want of jurisdiction.

Section 25, Title II, of The National Prohibition Act, provides, *inter alia,*

> "* * * A search warrant may issue *as provided in* Title XI, of public law number 24, of the Sixty-fifth Congress approved June 15, 1917, * * *"

Section 2 of the same act and title says, in part:

> "* * * Section 1014 of the Revised Statutes of the United States is hereby made applicable

> to the enforcement of this act. Officers mentioned in said Section 1014 are authorized to issue search warrants *under the limitations provided in* Title XI, of the act approved June 15, 1917."

Thus we have two provisions in the act itself providing for a search warrant; one saying that it may be issued "as provided in," the other, "under the limitations provided in," Title XI, etc. Now, Title XI, etc., is the "search and seizure" section of the Espionage Act (Comp. St. Ann. Supp. 1919, Sec. 10496¼a, *et seq.*), and there we find a provision as follows:

> "If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a *civil officer* of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, * * *"
>
> Comp. St., 10496¼f, 1919 Supp.

These provisions present the question squarely, whether search warrants may be lawfully issued to and served by "federal prohibition agents;" that is, is a federal prohibition agent a "civil officer" of the United States, within the meaning of these sec-

tions? The relator believes he is not; and if he is not, that the national prohibition act can not be enlarged by interpretation to include him within that class.

What is a Federal Prohibition Agent, anyway?

There is no such official known to the law as a "Federal Prohibition Agent,' 'the term being used simply as a convenient designation for departmental purposes.

> *Heaton vs. U. S.*, 280 Fed. 697 (C. C. A. 2nd Cir.).

Their origin springs from Article II, Section 2, of the Constitution, which reads in part as follows:

> "But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments,"

and the National Prohibition Act, Sec. 38, which reads, in part:

> "Sec. 38. The Commissioner of Internal Revenue and the Attorney General of the United States are hereby respectfully authorized to appoint and employ such assistants, experts, clerks, and other employees, in the District of Columbia and elsewhere, * * * as they may deem necessary for the enforcement of the provisions of the act * * *."

No doubt the court will take judicial notice of the fact that the Attorney General has never yet taken advantage of his power to appoint prohibition agents; that the appointment of the large corps of assistants necessary for the enforcemnt of the prohibition act has, so far, been left to the internal revenue department, rather than to the department of justice.

The form of appointment of these prohibition agents is usually as follows:

"No. United States Treasury Department

Internal Revenue Service, 1924.

This certifies that John Doe, of....., is hereby employed as a Federal Prohibition Officer to act under the authority of and to enforce the National Prohibition Act and acts supplemental thereto and all internal revenue laws relating to the manufacture, sale, transportation, control and taxation of intoxicating liquors, and he is hereby authorized to execute and perform all the duties delegated to such officers by law.

D. H. Blair, Com'r Internal Revenue.

(Countersigned) R. A. Haynes,

Federal Prohibition Com'r."

Keehn vs. U. S., 300 Fed. 493, at 506.

The duties of these prohibition agents are defined by Section 2, of Title 2, of the Prohibition Act, as follows:

"The Commissioner of Internal Revenue, his assistants, agents, and inspectors, *shall investigate and report* violations of this act to the United States Attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the attorney general, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents and inspectors, may swear out warrants before the United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the United States Attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury * * *."

These sections, so far as we can discover, cover the matter of their appointment and their duties. Apparently, then, they are humble employees, engaged for the purpose of ferreting out violations of the prohibition act.

Then why and how do we find these agents all over the United States in possession of and freely executing these drastic instruments of the law? Search of the books reveals their right to do so has been challenged no less than seven times.

U. S. vs. Keller, 288 Fed. 204;
U. S. vs. Syrek, 290 Fed. 820;

U. S. vs. O' Conner, 294 Fed. 584;
U. S. vs. Innelli, 286 Fed. 731;
U. S. vs. Musgrave, 293 Fed. 203;
U. S. vs. Loeffelman, 297 Fed. 472;
U. S. vs. Montalbano, 298 Fed. 667;
Keehn vs. U. S., 300 Fed. 493 (C. C. A.).

And we are disappointed to find that six out of the seven cases sustains the agents in this claim of power. The exception is *U. S. vs. Musgrave,* above, though a vigorous dissenting opinion by Judge Anderson, in *Keehn vs. U. S.,* above, adds great comfort to one whose reason casts his lot with the minority. Each of the six cases grant that these agents are not officers in the constitutional sense of that term, and are not *eo nomene* entitled to execute such warrants. But they grant them the power, by interpretation. They profess to see in various sections of the prohibition statute, and in various combinations of such sections, justification for *extending* and *enlarging* section 6 of the Espionage Act above quoted (Comp. St. 1919 Supp. 10496¼f), to include such agents. They do this in spite of the provisions of the act itself, that a search warrant may issue only "as provided in," and "subject to the limitations provided in" said Section 6, and in violence to the universal rule that search warrant provisions shall be strictly construed.

The able opinion of Judge Woodruff, in *U. S. vs. Musgrave,* above, and still more vigorous dissent of Judge Anderson, in *Keehn vs. U. S.,* above, leave little to be said in rebuttal of the majority, and any humble effort of ours would add no weight to what they say, so we leave the argument to them, with this added suggestion: Several of the courts refer to Section 28 of the National Prohibition Act to buttress their opinions. Should this court deem that section at all controlling, we refer this court to *Smith vs. Gilliam,* 282 Fed. 628, for an elaborate exposition of the import of said section 28.

Note. In a final search for the last work on this question, made since this point was developed for the printer, the opinion of this court in *Raine vs. U. S.,* 299 Fed. 407, has fallen under the eye of the writer for the first time. That case is squarely in point, and decides the question against our contention. Such being the law, we bow to it, but the writer can not refrain from expressing a regret that before so much authority had accumulated upon the point the minds of the various courts had not been squarely focused upon the many evils to follow such holding, of which the case at bar is so illuminating.

These agents are not under oath. Neither do they furnish any bond. There is no provision in the law for oath or bond. They, most of them, are fly-by-nighters. They are here today, there tomorrow—hired today, fired tomorrow. They are, for the most part, "under cover" men. They stay in one locality until they become known. Then their usefulness ended, they are shunted to a different district, to begin over again. Seldom do they go by their right names, nor do they maintain the same assumed name long. They are irresponsible financially, and no one in a given district is responsible for their acts, for they are employed from Washington. For any evil they do there is no redress. They step into some commissioner's office and obtain a search warrant. Nothing can stop them, provided they swear to "reasonable cause." Then they sally forth. Once the door of the Commissioner's office is closed behind them, they become a law unto themselves. No power on earth can control them. They run amuck with their search warrant, taking what their own will prompts them to take. But they don't show again. They neither return the search warrant, nor bring the property before any court. The Commissioner is powerless in the premises, for the law has cloathed

him with no power. And now we have the district courts confessing equal impotency. (Besides decision in the case at bar, see *U. S. vs. Maresca,* 266 Fed. 713; *U. S. vs. Mathes,* 1 F. (2nd) 935; *U. S. vs. Casino,* 286 Fed. 976; and also *In re Chin K. Shue,* 199 Fed. 282.)

It may be, indeed, that Congress contemplated giving such power to such irresponsibles; but if it did, one may be pardoned for thinking it was poor policy.

(3) *The warrant directed an investigation and search for evidence.*

This was clearly wrong. No right exists to search for evidence alone.

> *Goulet vs. U. S.,* 255 U. S. 298, 65 L. Ed. 647;
> *Giles vs. U. S.* (C. C. A.), 284 Fed. 208;
> *Veeder vs. U. S.* (C. C. A.), 252 Fed. 414.
> *Lipschutz vs. Davis,* 288 Fed. 974.

For the first and second reasons discussed, at least, the warrant was void, and the Commissioner exceeded his jurisdiction in issuing it.

WILL CERTIORARI LIE?

Granted that the Commissioner exceeded his jurisdiction, will certiorari lies to review him? And

will it afford a suitable remedy? Before discussing the question it is appropriate to consider what United States Commissioners are, and their relation to the Federal Judicial System. It is remarkable how little the subject has been touched upon in the books and nowhere has it received exhaustive treatment.

What Is a United States Commissioner?

As they now exist, United States Commissioners are the successors of the Circuit Court Commissioners, in vogue when we had a circuit court.

> "It shall be the duty of the district court of each judicial district to appoint such number of persons, to be known as United States Commissioners, at such places in the district as may be designated by the district court, which United States Commissioners shall have the same powers and perform the same duties as are now imposed upon Commissioners of the circuit court. * * *"

2 U. S. Comp. St. 1333.

But is the Commissioner a court? Does he "sit?" If so, in what court? Is he independent? Is he reviewable? And if so, how? We will quote from the books wherein we have found mention made of his character and functions.

The first word upon the subject, apparently,

was pronounced in 1866 by Mr. Justice Field, Circuit Justice for California (Fed. Case 16,235). After a hearing had before a United States Commissioner, the District Attorney proposed to dismiss certain criminal proceedings contrary to opinion of the Commissioner, and the latter appealed to the court for its opinion on the power of the District Attorney so to do. Justice Field said, *inter alia:*

> "He (the Commissioner) is thus made a magistrate of the government, exercising functions of the highest importance to the administration of justice. * * * He has no divided responsibility with any other officer of the government; nor is he subject to any other's control. * * * We are clear that he must act upon his own judgment of the law and evidence, and not upon that of any other person."

U. S. vs. Schumann, Fed. Cas. 16,235.

Not until 1894 did the Supreme Court of the United States speak upon the subject. In *United States vs. Allred,* decided in that year (155 U. S. 591, 39 L. Ed. 273), the Supreme Court set forth in detail the powers of Circuit Court Commissioners as those powers existed when that decision was rendered. As the list of powers is long it will not be copied here, but the court is respectfully cited to the case for the same. Having in mind the powers

of Commissioners as recited by the court, the court then defined the status of such Commissioners in these words:

> "While the duties are thus prescribed by law, and while they are, to a certain extent, independent in their statutory and judicial action, there is no law providing how their duties shall be performed; and so far as relates to their administrative action, we think they were intended to be subject to the orders and directions of the court appointing them. As was said by this court in *Griffin vs. Thompson,* 43 U. S. 2 How. 244, 257, 11 L. Ed. 253, 258, 'there is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgment and process. Without this power courts would be wholly impotent and useless.' While no expressed power is given over these officers by statute, their relations to the court are such that some power of this kind must be implied. Though not strictly officers of the court, they have always been considered in the same light as masters in chancery and registrars in bankruptcy, and subject to its supervision and control."

U. S. vs. Allred, 155 U. S. 591, 39 L. Ed. 273.

A little later in the same year the same court spoke of them in this manner:

> "That a Commissioner is not a judge of a court of the United States within the constitutional sense is apparent and conceded. He is simply an officer of the Circuit Court appointed

and removable by that court. * * * A preliminary examination before him is not a proceeding in the court which appointed him, or of any court of the United States."

Todd vs. U. S., 158 U. S. 278, 39 L. Ed. 982.

The last expression of that court upon the subject, so far as we are able to find, was written in 1902, wherein it was said:

"The Commissioner is in fact an adjunct of the court, possessing independent, though subordinate judicial powers of his own."

Grin vs. Shine, 187 U. S. 181, 47 L. Ed. 130.

Expressions from lower courts now follow:

"They (Commissioners) are not strictly officers of the Circuit Court, but exercise somewhat independent powers. They may be controlled by the court by general rules and by the mandatory writs by which courts of superior jurisdiction can control the actions of courts and officers of inferior jurisdiction and powers."
U. S. vs. Harden, 10 Fed. 802, at 803.

"They are not conservators of the peace * * *. They are not prosecuting officers, but exercise important judicial functions in passing upon questions involving the rights of the government and the liberty of the citizen."

Same, at page 806:

"Commissioners have no power to punish

for contempt. But the contumacious conduct of parties, witnesses and others guilty of such conduct should be referred to the Circuit (now District) Court."

Ex parte Perkins, 29 Fed. 900;
In re. Perkins, 100 Fed. 950;
U. S. vs. Beavers, 125 Fed. 778.

"Much of the fallacy in the reasoning on this subject is founded on the assumption that a Commissioner holds a court. The assumption is unsound and misleading. The Commissioner holds no court. He acts as an arresting, examining and committing magistrate."

Ex parte Perkins, above, (29 Fed.), at p. 909;
In re. Perkins, above, (100 Fed.), at p. 954.

Commissioners may issue subpoenaes.

U. S. vs. Beavers, 125 Fed. 778.

"They were originally authorized to be appointed by the United States Circuit Courts for the purpose of taking oaths and acknowledgments. Their powers were subsequently increased by various statutes and rules of court. By Section 1014 of the revised statutes (Comp. St. 1674) they were authorized to act as examining and committing magistrates in criminal cases in any state 'agreeably to the usual mode of process against offenders in such states'."

U. S. vs. Beavers, 125 Fed. 778, at p. 779.

"The power of a Commissioner when sit-

ting as a criminal magistrate, to issue subpoenaes, has sometimes been thought to be a power inherent in his office, independent of statute; *for though he is not strictly a court of the United States* (*Todd vs. U. S.,* 158 U. S. 278, 15 Sup. Ct. 889, 39 L. Ed. 982), *he discharges judicial functions* of grave importance, and in so doing has no *divided responsibility* with any other officer of the government, and is not subject to any other's control."

Same, at 780, and cases cited.

"United States Commissioners are neither judges nor courts, nor do they hold courts, although sometimes they act, so far as *jurisdiction and power* is conferred upon them, in a *quasi judicial* capacity."

U. S. vs. Tom Wah, 160 Fed. 207, at 208.

Citations upon the subject would not be complete if special mention were not made of two New York cases, *U. S. vs. Maresca,* 266 Fed. 713, decided by Judge Hough, sitting in the Southern District of New York, and *U. S. vs. Casino,* 286 Fed. 976, decided by the same court, but with Judge Hand presiding. It is impossible to do justice to either by quotation, and the court is respectfully cited to the original decisions. We shall have occasion to refer to them again, when we come to treat of certiorari as a remedy.

See, also,

In re. Chin K. Shue, 199 Fed. 282.

All of the cases from which we have quoted, except the two New York cases just cited, were decided before the National Prohibition Act took effect. We think it desirable to consider that act as having a possible bearing upon the subject, for we believe it fair to say that the Prohibition Act has enlarged the functions of the Commissioner, so that now, if not before, he acts in a judicial capacity, or as a new tribunal having limited jurisdiction. To show the point, we quote some of the sections taken from the Espionage Act, the search and seizure sections adopted by the Prohibition Act:

> "If the * * * Commissioner * * * is satisfied of the existence of the grounds of the application or that there is a probable cause to believe their existence, he must issue a search warrant * * * commanding him forthwith to search the person or persons named, for the property specified, and bring it before the Commissioner."
>
> Sec. 6.
>
> "If the grounds on which the warrant was issued be controverted, the * * * Commissioner must proceed to take testimony in relation thereto, * * *."
>
> Sec. 15.

"If it appears that the property or paper taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the * * * Commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant issued, then the * * * Commissioner shall order the same retained in the custody of the person seizing it, or to be otherwise disposed of according to law."

Sec. 16.

Now, can it be said that an officer upon whom has been conferred power to judicially determine whether or not a search warrant should issue, and before whom, upon the search warrant being returned and the allegations of the application on which it issued being controverted, a trial of issues of law and fact may proceed, and a judgment or final order be made thereupon, restoring or holding property, does not exercise more than quasi judicial functions? It seems to relator that by conferring these powers upon the commissioner, Congress has raised the commissioner in status to a special tribunal.

Again,

"The * * * commissioner must annex the affidavits, search warrant, return, inventory, and evidence, and if he has not power to inquire into the offense in respect to which the warrant issued he must at once file the same, together with a copy of the record of his proceedings, with the Clerk of the Court having power to so inquire."

Sec. 17.

An officer exercising judicial functions, who is required to certify his proceedings to another court, there to be used in the prosecution of the offense to which such proceedings relate, is in the very nature of things a court; and a court inferior to the one to whom he certifies his proceedings.

We have garnered the cases treating upon the question however slightly, in order to arrive at a conclusion for ourselves. But no case having gone deeply into the subject, and such as have touched upon it at all being so out of harmony, our conclusion is of little moment to a court charged with responsibility to settle the question. Judges Hough and Hand, sitting in the same court, seem to have gone fartherest toward final conclusion, and to have given the subject deepest thought. But while both agreed that proceedings before a commissioner were proceedings in the district court, beyond that their

decisions are completely out of harmony.

Will Certiorari Lie?

In *U. S. vs. Maresca,* 266 Fed. 713, hereinbefore referred to, Judge Hough concluded that a United States Commissioner, acting in search warrant proceedings, is "a justice of the peace of the United States" (p. 720); that in so acting, "he does it in and as part of the proceedings of the district court" (p. 723); that the commissioner, under such circumstances, is exercising a power equal to the power of the district court, because the search warrant statute entrusts the issuance of the warrant to the commissioner and to the district court in common; therefore the commissioner can not be reviewed by the district court, any more than one judge can review the proceedings of any other judge sitting in the same court (p. 724); therefore, certiorari does not lie (p. 722), and the only remedy is a writ of error from the commissioner to the Circuit Court of Appeals (p. 724).

But in *U. S. vs. Casino,* 286 Fed. 976, Judge Hand, sitting in the same court three years later, had the same question before him, and he took occasion to comment upon the *Maresca* case. He assumed

without question that the commissioner's proceedings were in the district court, and that the latter might take judicial notice of them (p. 978). He followed this by holding that such proceedings were "a 'preliminary stage' to an inquiry which the court must eventually determine" (p. 981). That certiorari, whether it lie or not, was unnecessary; that a "motion," on notice to the district attorney, would present the question for consideration; and he disposed of the matter instanter (p. 981). In conclusion, however, he indulged the hope that the matter might be carried to the Circuit Court of Appeals, that the question of proper practice might be authoritatively settled. Apparently this hope was not realized, and the practice remains unsettled.

If Judge Hand was right, that commissioner's proceedings are proceedings in the district court, and may be corrected or reviewed upon motion, with notice to the United States attorney, then relator has been making something hard out of something very easy. Even the ancillary relief sought lay at hand, in plain sight and ample, for in the *Casino* case Judge Hand ruled, "An order may pass, quashing the warrant and directing the liquor to be returned to the petitioner. Whoever holds the liquors at the

present time is subject to the order of this court under Section 25. The order will primarily go against the prohibition agent making the seizure; if he has delivered the goods to some other official, the order will direct the latter to make the return." (p. 981). That is all relator desired; an order to pass quashing the warrant and directing the papers to be returned to petitioner; that whoever held them, held them subject to the order of the court; that this order go primarily against the prohibition agents making the seizure; and if they had delivered them to some one else then the order to direct the latter to make the return.

If such is the law, then the lower court was in error in denying relator the relief sought. True, we styled our proceedings "certiorari," but it makes no difference by what term the proceedings are called. The facts were plainly stated, entitling relator to relief, and the prayer had the usual alternative, "for such other and further relief as may seem meet and proper in the premises according to equity."

But if such is not the law, and some plenary proceeding is necessary, does certiorari lie, Judge

Hough to the contrary notwithstanding?

The statutes of the United States at one time provided in specific terms for the writ of certiorari. (Vol. 2, Rev. St., p. 1294, Sec. 542, et seq.). But these sections were repealed by the Judicial Code of 1911. (Jud. Code, Sec. 297, Comp. St. 1274). In lieu thereof Congress enacted as follows:

> "The supreme and the district courts shall have power to issue writs of *scire facias*. The Supreme Court, the circuit court of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

R. S. 716, Jud. Code, 262; Comp. Stat. 1239.

The general right of district courts to issue the write of certiorari is recognized *In re Chetwood,* 165 U. S., at p. 461, 41 L. Ed. 782. (See *U. S. vs. Maresca,* 266 Fed. 713, at 722).

> "The decided weight of authority supports the proposition that the common-law writ of certiorari may be awarded to all inferior tribunals, where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed or other mode provided for reviewing their proceedings."

5 R. C. L., "Certiorari," Sec. 4, p. 251.

"As a general rule the common law writ of certiorari may be awarded to all inferior tribunals and jurisdictions, where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal is allowed or other mode provided for reviewing their proceedings. Therefore an appellate court may grant a writ of certiorari to bring up for review a search warrant and the proceedings in which it has been issued, and may quash the warrant if it is shown to have been issued improperly. And it has been held that certiorari lies to review the action of a justice of the peace without jurisdiction in issuing a search warrant not authorized by statute, even if there is a remedy by appeal."

24 R. C. L., "Search and Seizure," Sec. 14, p. 711.

Function of Writ of Certiorari.

The office of the writ is to bring to a superior court for review the record and proceeding of an inferior court, *officer,* or a *tribunal* exercising judicial functions, to the end that the validity of the proceedings may be determined, excesses of jurisdiction restrained, and errors, if any, corrected.

6 *Cyc.* 752, and cases cited.

When a new or summary jurisdiction is created,

the proceeding so authorized, *whether in court or not,* if of a judicial or quasi judicial character, and not subject to review by writ of error or appeal, may be removed to and reviewed by a superior court by virtue of this writ (certiorari).

5 R. C. L., p. 253.

Parks vs. Boston, 8 Pic. (Mass.), 218, 19 Am. Dec. 322, 40 A. S. R. 30.

It is not a proceeding *against* the tribunal, or any individual composing it: it acts upon the cause or proceeding in the lower court, and removes it to the superior court for reinvestigation.

11 *Cor. Jur.,* p. 89, Sec. 2B.

So it has been held that certiorari will lie to all tribunals which are called extraordinary and special, in contradistinction to the ordinary and common courts established for the trial of criminal offenses and the determination of private rights.

11 *Cor. Jur.,* p. 98, Sec. 24F.

The Supreme Court of the United States in a case not in point upon the facts, but which involves a discussion of certiorari and its office, said:

"Certiorari always has been recognized in the district as an appeal process for reviewing the proceedings in a subordinate tribunal when it has proceeded, or is proceeding to judgment without lawful jurisdiction (citing several cases). And the power to employ the writ inheres in the Supreme Court of the district as possessing a general common law jurisdiction and supervisory control over inferior tribunals, analagous to that of the King's bench. * * * The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed, if it be made plain to appear that such inferior court or special tribunal had no jurisdiction of such matter, or had exceeded its jurisdiction, or had deprived a party of a right or imposed a burden upon him or his property without due process of law (citing several cases).

Hartranft vs. Mallowny, 247 U. S. 295, 62 L. Ed. 1123, at 1126.

Under their supervisory powers courts of general jurisdiction exercise, by writ of certiorari, a control over all inferior jurisdictions however constituted, which are vested with power to decide on personal or property rights, and whatever their course of proceedings:

6 *Cyc.* 770, "A," and cases cited.

The court is the only necessary party respondent in a proceeding to review its order.

6 *Cyc. L. & Pro.,* p. 776 (B).
Baker vs. Shasta Co. Sup. Ct., 71 Cal. 583.

Review of Search Warrant Proceedings by Certiorari.

In *ex parte Oklahoma,* 220 U. S. 191, 55 L. Ed. 431, the Supreme Court of the United States held that a writ of certiorari to bring up for review a search warrant and the proceeding in which it issued was a proper remedy, and not prohibition, and that on certiorari the search warrant proceeding, if shown to have been issued improperly, might be quashed.

And it has been held that certiorari lies to review the action of a justice of the peace in issuing a search warrant not authorized by statute, even if there is a remedy by appeal.

White vs. Wager, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60.

In the Canadian courts exercising common law jurisdiction the right to review search warrant proceedings by certiorari was upheld in the case of *Rex vs. Kehr* (Ont.), 6 Ann. Cas. 612.

The only cases to the contrary which relator has been able to find, after a search of the books bearing on the question, are the two cases,

Farrow vs. Springer, 57 N. J. L. 353, 31 Atl. Rep. 215;

Lynch vs. Crosley, 134 Mass. 313.

These two cases are *sui generis:* In the Massachusetts case the court held there was an adequate remedy under the statutes of that state. In the New Jersey case, it should be held in mind that the laws of the state embody prior equity practice under which a court may make an equitable ruling for the instant case before it, and the court held that the remedy by a suit for damages would give substantial relief to the petitioner there.

ANCILLARY MATTERS.

We had asked for the impoundment of the papers, and an order restraining their use or the use of any information gained from a perusal of them. The lower court was much perturbed over these requests. He feared, to use his own words, that such an order would "cause the court to appear ridiculous," being of the opinion that he could not

control parties not officers of the court nor parties to the proceedings.

Relator believes that if the lower court has power to review at all, and should enter an order taking jurisdiction for that purpose, then if he find the commissioner's proceedings are a nullity, he has full power to enter such orders in the premises as are necessary to grant effective relief. In other words, if he takes over the proceedings at all, the situation becomes the same as though he had started the search warrant proceedings himself. Had he started them, no doubt he would have power to finish them.

We do not entertain the same misgivings he does about controlling prohibition agents, because they are not officers of his court. If he has jurisdiction of the proceedings at all, then he can control them, for in that event they *are* "officers" of his court. They are the ones armed with the search warrant. Whether they be "officers" of the court, or "adjuncts," "arms," "agents," servants," or by what name they be called, makes no difference. They were sent forth with the writ. Then they can be recalled, or otherwise controlled, not because they are officers in fact, but because they were the agency

used to execute the warrant of the court.

Impoundment of papers is recognized practice.

U. S. vs. Mills, 185 Fed. 318;
U. S. vs. McHie, 196 Fed. 586;
U. S. vs. Mounday, 208 Fed. 186;
Silverthorne Lumber Co. vs. U. S., 251 U. S. 385, 64 L. Ed. 319.

IN CONCLUSION.

The prohibition agents have now had possession of relator's papers for so long a period that to impound them now would not be the remedy that it would have been if done before they had had exhaustive use of them. Nevertheless, relator is entitled to have them back, and such relief as the court can afford against the use of them and any information obtained from them, and we trust this court will see its way clear to instruct the lower court to grant such relief as relator is clearly entitled to.

Respectfully submitted,

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